United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-7473

To be argued by
JOSEPH A. BERGADANO

United States Court of Appeals

For the Second Circuit

B P/S

BOISE CASCADE CORPORATION,
Plaintiff-Appellant,

against

E. TODD WHEELER and
THE PERKINS & WILL PARTNERSHIP,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR APPELLEES

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Preliminary Statement

Defendants-appellees ("the Architect") were the architects for a construction project for Mt. Sinai Hospital of Hartford, Connecticut ("the Hospital"). By a written contract dated October 29, 19[illegible] Hospital engaged Walter Kidde Constructors, Inc. ("Kidde") as the Hospital's general contractor to do the actual construction work. That agreement contained a "non-assignment" clause with respect to Kidde.

Kidde subsequently commenced arbitration against the Hospital on various claims totaling $9.6 million for "changes, extras and delays." The Hospital thereafter

commenced arbitration against the Architect for indemnity for Kidde's claims against the Hospital, which arbitration was consolidated by court order with the Kidde-Hospital arbitration.

While that consolidated arbitration was pending, plaintiff-appellant ("Boise"), Kidde's former sole stockholder, commenced the instant action against the Architect based on essentially the same claims being prosecuted by Kidde against the Hospital in the aforesaid consolidated arbitration, seeking $10 million in compensatory damages because of alleged negligence and fraud by the Architect and a further $10 million for alleged punitive damages.

The Architect moved in the court below to dismiss Boise's amended complaint and the action under Rules 12(b) and 19 of the Federal Rules of Civil Procedure, for Boise's failure to join an indispensable party (Kidde) under Rule 12(b)(1), Federal Rules of Civil Procedure, for lack of subject matter jurisdiction because complete diversity of citizenship will not exist between the indispensable plaintiff (Kidde) and the Architect and the joinder of the indispensable plaintiff (Kidde) will deprive the federal courts of diversity jurisdiction under §1332, 28 U.S.C., as well as under Rule 19(a), Federal Rules of Civil Procedure, on the ground that to permit Boise to prosecute the instant action based on the identical claims which Kidde is simultaneously prosecuting in the consolidated Kidde-Hospital-Architect arbitration in which the Architect is a "third-party defendant" would subject the Architect to a substantial risk of incurring double, multiple or otherwise inconsistent obligations as a result thereof, contrary to the proscription of Rule 19(a).

The court below granted the Architect's motion on all grounds by a decision dated September 10, 1976.

The Architect submits this brief in answer to Boise's brief and in support of the order of the District Court for the Southern District of New York (MacMahon, J.) dismissing the action pursuant to Rules 12(b) and 19, Federal Rules of Civil Procedure.

Issues Presented

1. Is Kidde an indispensable party to the action? The court below held that it is.

2. Is Kidde an entity which should be joined as a party pursuant to Rule 19(b), Federal Rules of Civil Procedure, for a just adjudication of this matter? The court below held that it is.

3. Should the action proceed in the absence of Kidde as a party plaintiff? The court below held that it should not.

Nature of the Action

In addition to the recitation above under the "Preliminary Statement", the amended complaint alleged that Boise is a Delaware corporation having its principal place of business in Boise, Idaho and that Boise maintains an office for the conduct of its business in the City, County and State of New York.

It is further alleged that Boise was the sole stockholder of Kidde until February, 1973 and is entitled to the pro-

ceeds and is responsible for the expenses of all claims arising out of the hospital construction job.

It also is alleged that the Architect is a partnership with its principal place of business in New York, that the court below had jurisdiction because of diversity of citizenship between the parties and the matter in controversy exceeds $10,000, exclusive of interest and costs.

There is no allegation in the amended complaint as to Kidde's state of incorporation or principal place of business nor of any assignment whatsoever by Kidde to Boise of any claims which Kidde had or allegedly had, either against the Architect or anyone else, arising out of or in connection with either the Hospital-Kidde contract, the aforesaid construction job or anything else.

All of the claims alleged by Boise in the amended complaint arise out of the aforesaid construction job for which Kidde was the Hospital's general contractor and the Architect was the Hospital's architect, which claims essentially are the same claims simultaneously being prosecuted by Kidde against the Hospital in the aforesaid consolidated Kidde-Hospital-Architect arbitration in which the Architect is a "third-party defendant" to the Hospital for Kidde's claims.

The Facts

In October, 1968 Kidde entered into a written contract with the Hospital for the construction work involved (101).* There was incorporated by reference as part of that contract the General Conditions to the Specifications (108).

* Numbers in parentheses refer to pages in the Appendix.

Paragraph 46 of those General Conditions forbids any assignment of the contract or monies due Kidde thereunder without the written consent of the Hospital (115). No such assignment ever was made by Kidde, either with or without the Hospital's consent, nor is any such assignment alleged.

Kidde undertook the construction work, during which certain differences and disputes arose, as a result of which Kidde made various claims of monies due it as a result of changes, extras and delays. On July 14, 1971 Kidde presented a 51 page claim against the Hospital in the sum of $3,573,425 (117).

Thereafter, Kidde presented to the Hospital a proposed change order dated February 24, 1972 in the sum of $335,500 (169).

By Demand dated March 24, 1972, Kidde demanded arbitration with the Hospital under the aforesaid construction contract for its claim in the sum of $335,500 (171).

By an amended Demand for arbitration dated June 28, 1972, Kidde made claim against the Hospita' for:

> "Damages sustained to date, in excess of $6,000,000.00, and any and all other damages that hereafter may be sustained by Claimant [Kidde] arising out of the contract dated October 29, 1968." (175)

That amended Demand specifically refers to Kidde's aforesaid claim of July 14, 1971 (176).

Thereafter, in the course of various legal proceedings between the Hospital and Kidde in connection with that arbitration, Kidde presented a "revised and updated claim"

in the sum of $9,645,787 (190), which it further revised in August, 1974 (214).

While those proceedings were pending, by Demand dated April 20, 1973, the Hospital demanded arbitration with the Architect stating as the nature of the dispute:

> "The arbitration instituted by Walter Kidde Constructors, Inc. against The Mount Sinai Hospital and State of Connecticut Health and Education Facilities Authority, a copy of which is annexed hereto." (179)

There was annexed thereto both Kidde's aforesaid original Demand for Arbitration dated March 24, 1972 and Kidde's aforesaid amended Demand dated June 28, 1972 (182-189).

The Hospital-Architect arbitration was consolidated with the Kidde-Hospital arbitration as a result of proceedings in the Supreme Court, New York County, which were affirmed by the Appellate Division, First Department. As a result, the Architect is a full party to the now-consolidated Kidde-Hospital-Architect arbitration, as a "third-party defendant" to the Hospital for Kidde's claims against the Hospital.

Arbitration hearings commenced in that consolidated arbitration in September, 1975 but were suspended and abrogated in November, 1975 as a result of the disqualification of one of the arbitrators by the Supreme Court, New York County. That arbitration had not recommenced at the time of the motion below due, in part, to various legal proceedings brought by Kidde and others in the Supreme Court, New York County, as a result of which the arbitration was then temporarily stayed pending that Court's de-

cision of three separate motions which were submitted to that Court on March 5, 1976. They have since recommenced.

Kidde's basic claims in the arbitration which total almost $10 million are substantially the same as those which are the bases of Boise's claims in the instant action.

On December 5, 1975, approximately one month after the last hearing in the aborted prior arbitration hearings, Boise filed the instant suit in the District Court below making direct claim in the name of Boise against the Architect on those claims for the sum of $10 million. Boise's amended complaint also contains allegations of fraud based on those same claims, for which it seeks punitive damages of a further $10 million.

Prior thereto, by agreement dated February 2, 1973, Boise sold to A.M. Kinney, Inc. ("Kinney"), an Ohio corporation, all of the outstanding capital stock of Kidde (241). As shown by that document and confirmed by the deposition of Mr. Dornbusch (Boise's witness on deposition in this action) (37) and the affidavits in the Appendix:

1. at least three (3) partners of the Architect, including the partner in charge of the Architect's two New York offices, are residents and citizens of the State of New York (2, 3, 4);

2. Kidde at all times was and still is a New York corporation (53, 292);

3. Kidde and Boise at all times were and still are separate corporate entities with separate stockholders, officers and directors (255, 256);

4. under the specific provisions of Kidde's contract with the Hospital, Kidde could not assign that contract or any monies due Kidde thereunder without the Hospital's consent (115);

5. Kidde never made any assignment or legal transfer of any kind to Boise of any of Kidde's assets or claims, including the claims being asserted here by Boise which are essentially the same claims being prosecuted by Kidde in the pending Kidde-Hospital-Architect arbitration (46-50, 340, 348, 175, 179, 190, 214, 24);

6. Kidde was never a party to the Boise-Kinney agreement, did not ratify it, "adhere" to it or confirm it in any way (241-254, 37-100);

7. Boise was never a party to the Kidde-Hospital contract, the construction work thereunder or the claims asserted and being prosecuted by Kidde arising out of that contract and work (241-254, 37-100);

8. the Boise-Kinney agreement *specifically* provides that Boise shall prosecute any claims which Kidde had arising out of Kidde's construction contracts "in the name of Kidde" (247, 248);

9. Kidde never authorized anyone, including Boise, to prosecute any claims which Kidde had, in the name of such other party (253);

10. *all* other claims being prosecuted or defended on behalf of Kidde, including Kidde's identical claims with those being asserted in this action (which are in arbitration) are being prosecuted or defended in Kidde's name, except for the instant action (88);

11. the instant action is the *only* instance where Boise seeks to assert or prosecute any of Kidde's alleged claims in the name of Boise (87, 88);

12. the Architect is a "third-party defendant" in the Kidde-Hospital-Architect arbitration and, as such, is exposed to a substantial risk of incurring double, multiple or otherwise inconsistent obligations as a result of the two separate proceedings, namely the consolidated Kidde-Hospital-Architect arbitration and the instant action by Boise on the same claims (337).

While Boise and Kinney made various agreements, promises and undertakings in the aforesaid Boise-Kinney agreement, there are *no* undertakings, promises or agreements *by* Kidde either in, in connection with or separate from that agreement relating to that agreement.

In that agreement both Boise and Kinney repeatedly recognized that Kidde, a separate New York corporation, is a completely separate entity with rights, obligations and duties of its own. In addition, it is specifically set forth in at least two (2) paragraphs of that agreement ("11" and "12(d)") that all claims on behalf of Kidde arising out of construction jobs which are to be litigated or arbitrated or defended against by Boise are to be "* * * *in the name of Kidde*" (247, 248).

Both prior and subsequent to that agreement Kidde's claims arising out of the Hospital construction job, the aforesaid arbitration and all legal proceedings in connection therewith were all in the name of Kidde, up to the present date (171, 175, 190, 214).

In addition, all correspondence produced by Boise's witness on the aforesaid deposition in this action which he claimed indicated or referred to claims being made by either Kidde or Boise against the Architect:

1. is dated *subsequent* to the Boise-Kinney agreement of February 2, 1973; and

2. is on *Kidde's* letterheads (257-265).

Further, in response to inquiry as to Kidde's officers and directors subsequent to February 2, 1973, Boise's counsel and witness in this action presented a letter dated January 8, 1975 on *Kidde's* letterhead with schedules annexed thereto showing Kidde's separate officers and directors both in 1973 and 1975 and again confirming that Kidde was and is an active, separate corporation which is still in existence (255-256). In addition, the Corporations Bureau of the New York Department of State further confirmed on March 5, 1976 that Kidde has not been dissolved (292).

In an affidavit by Boise's Senior Vice President, Mr. Will M. Storey, sworn to October 15, 1975, which Kidde submitted to two New York Courts in connection with these very claims (342-348), he stated:

> "11. Thus, the sale of the stock of Kidde by Boise to Kinney in February of 1973 occurred four years and four months after the contract between Kidde and the Hospital; occurred more than two years after the claim was first made against the Hospital; and occurred when Kidde's work was substantially completed. *The claimant* [Kidde] *is still the same viable legal entity that entered into the contract with the Hospital and is still engaged in construction work.*" (346) (Emphasis supplied.)

He further swore in that same affidavit, that:

> "10. As of January 24, 1973, a Kidde payment request indicated that $13,713,170.42 of work had been completed for the Hospital, which represented approximately 98% of the contract price." (346)

And he further swore:

> "15. *There has been no assignment by Kidde of its construction contract with the Hospital. On the contrary, said agreement specifically provides that Kidde would, after its stock was acquired by Kinney, continue and complete the Hospital project. This was performed by Kidde and the construction completed in July, 1973. The transaction between Boise and Kinney was simply and solely a sale of corporate stock by one parent corporation to another.*" (348) (Emphasis supplied.)

By affidavit sworn to October 21, 1975 (338) Boise's very counsel in this case swore that Boise was:

> "* * * a company which has an *indirect* interest in the outcome of the case * * *" (339) (Emphasis supplied.)

referring to Boise's interest in the same, identical claims which then were and now are being prosecuted by Kidde in the aforesaid consolidated arbitration proceedings and now attempted to *simultaneously* be prosecuted here by Boise.

He also swore in that same affidavit that:

> "6. *Kidde was not a party to the sale agreement between Boise and Kinney and made no assignment to anyone of its claim against the Hospital.* Under the terms of said sale agreement, the relationship between Kidde and the Hospital remained untouched." (340) (Emphasis supplied.)

Boise's Contentions

Boise contends on this appeal that it is the "real party in interest"; that it "retained" Kidde's claims arising out of the Hospital job; that "there is no obligation" under the Boise-Kinney agreement whereby Boise must prosecute any of Kidde's claims in Kidde's name; that the Architect "lacks standing to enforce" the Boise-Kinney agreement; that "all parties acquiesced in Boise's role"; and similar arguments. In support of its contentions Boise alleges, among other things, that after February, 1973:

1. Boise dealt with the Hospital and the Architect on the Hospital job;

2. Boise completed the construction on that job;

3. Boise was the "direct recipient of continuing wrongful acts of * * *" the Architect;

4. Boise paid the taxes on all proceeds of the claims arising out of Kidde's work received after February, 1973;

5. the Supreme Court, New York County, "found" that Boise is the real party in interest on Kidde's claims arising out of the job in question; and that

6. neither Kidde nor its current "parent", Kinney, has any interest in or control over the claims being asserted by Boise in this case.

It is respectfully submitted that the documented facts fully refute all of Boise's contentions and that on those facts and the applicable law Boise's appeal herein should and must be denied in all respects.

POINT I

Kidde is an indispensable party plaintiff whose joinder will destroy diversity jurisdiction.

As the documented facts show, Kidde at all times was and still is a separate New York corporation with its own separate officers and directors (52, 255, 256, 292). While Boise apparently was the sole holder of Kidde's stock up to February 2, 1973 when it sold that stock to Kinney, since February 2, 1973 Boise has not even been a stockholder of Kidde (241). Since that date Kinney apparently has been and still is the sole holder of Kidde's stock. Nor was Boise a stockholder, officer or director of Kidde either at the time the instant action was commenced or at the present time (255, 256).

In addition, there were no powers of attorney or authorizations given at any time by Kidde to anyone, including Boise, authorizing such other party to prosecute any claims which Kidde had or has against anyone, including the Architect, either on Kidde's behalf or in the name of such other party (273). Nor did Kidde transfer, assign or vest any proprietary rights to any assets, claims or choses in action which it had or has against anyone, including the defendants herein, to anyone else, including Boise (46-50, 340, 348).

The facts also show that the claims being made by Boise in the instant action are essentially the same claims which Kidde has made against the Hospital and are based upon virtually identical claims being made by Kidde against the

Hospital in the pending arbitration proceedings (except for the claim for punitive damages), in which the Architect is in effect, a "third-party defendant" to the Hospital for those very claims (175, 179, 190, 214; *cf.* 24).

The facts also show that Boise was not a party to the contract between Kidde and the Hospital for the construction work out of which Kidde's alleged claims arise (101-107) and that, in fact, by the provisions of that contract (General Conditions 46) Kidde was prohibited from assigning both that contract and any monies due it under that contract (115). They also show that Boise was not a party to the actual construction work (346, 348) and that when Kidde alleged that it had claims against the Hospital arising out of that work, Kidde presented those claims directly, in its own name, both before and after Boise sold all of Kidde's stock (117, 175, 179, 190, 214).

It is nowhere alleged in the amended complaint that Boise and Kidde are one entity. The only allegation respecting those two parties is that up to February, 1973 Boise was the sole owner of Kidde's stock (24). While it is alleged in that same paragraph (¶2) that Boise "* * * was responsible for the completion of construction and losses or expenses arising out of a Kidde contract to construct a hospital in Hartford, Connecticut * * * and is entitled to the proceeds and is responsible for the expenses of all claims arising out of the Project," the document upon which that allegation apparently is based is merely an agreement between Boise and Kinney, to which Kidde was not a party, did not join, did not ratify or confirm in any way and which, specifically, states in at least two (2) places

that any claims which Kidde had were to be prosecuted *in Kidde's name* (247, 248).

Further, as respects the completion of the construction job in question, Paragraph "12(a)" of the agreement states:

> "Contracts that [Boise] desires *Kidde to complete or cause to be completed*, for [Boise's] account, namely, Mt. Sinai Hospital, * * *" (248). (Emphasis supplied.)

In addition, Boise's own Senior Vice President has sworn in an affidavit submitted to the state courts in connection with the Kidde-Hospital-Architect arbitration that *Kidde, not Boise*, completed the hospital construction work (348).

Since Kidde is a separate, existing legal entity which at no time assigned *any* of its claims to Boise, including the claims which Boise seeks to prosecute in the instant case, Kidde is an indispensable party plaintiff to the instant action. Rule 19, FRCP; *State of Washington* v. *United States*, 87 F.2d 421, 427 (9th Cir. 1936); *Young* v. *Garrett*, 3 F.R.D. 193, aff'd 149 F.2d 223 (8th Cir. 1945); *Charles Keeshin, Inc.* v. *Farmers and Merchant's Bank of Rogers*, 199 F. Supp. 478 (USDC, W.D. Ark. 1961).

While the determination of indispensability is a matter of Federal procedure, in diversity cases the standards to be applied to the rights and interests of the parties are derived from, and defined by, state law. *Jones Knitting Corporation* v. *A. M. Pullen & Company*, 50 F.R.D. 311 (USDC, S. D. N. Y. 1970).

As stated in *Jones Knitting Corporation* v. *A. M. Pullen & Company, supra,* at page 314:

> "An indispensable party is one who must be joined because his non-joinder is so prejudicial, both to his rights and to those of the parties already joined, that the action *cannot* continue without him." (Emphasis in original.)

Rule 19(a), Federal Rules of Civil Procedure, describes a person needed for just adjudication as one who should be joined if:

> "(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest in the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."

Since Kidde is the party who has whatever claims it may have arising out of the hospital job under New York law and since Kidde admittedly never assigned to Boise any claims which it had or may have arising out of that project, Kidde is an indispensable party to this action since Kidde's rights to such claims remain in Kidde.

Also, under New York law, which is the law applicable to Kidde as a New York corporation and the rights and interests thereof, it is clear and long-established that the business of a corporation and its assets are those of the corporation and not of the stockholders or of a "parent" corporation of which the New York corporation is a "sub-

sidiary''. *Torrey Delivery, Inc.* v. *Chautauqua Sales & Service, Inc.*, 47 A.D.2d 279, 282, 366 N.Y.S.2d 506, 510 (4th Dept. 1975); *Brock* v. *Poor*, 216 N.Y. 387, 401 (1915); *Connecticut General Life Insurance Company* v. *Superintendent of Insurance*, 10 N.Y.2d 42, 50 (1961); *In the Matter of Green's Estate*, 231 N.Y. 237, 246-247 (1921); *Buffalo Loan Co.* v. *Medina Gas Co.*, 162 N.Y. 67 (1900); *People* v. *American Bell Telephone Co.*, 117 N.Y. 241, 251-257 (1889); *People ex rel. Edison Light & Power Installation Co.* v. *Kelsey*, 101 App. Div. 205 (3d Dept. 1905); *In re Beck Industries, Inc.*, 479 F.2d 410 (2d Cir. 1973); *Berger* v. *Columbia Broadcasting System, Inc.*, 453 F.2d 991 (5th Cir. 1972).

In the instant case, Boise had not been a stockholder of Kidde for almost three (3) years prior to the time the instant action was instituted. Indeed, as Boise admits in its amended complaint and as shown by the documented facts, Boise sold all of its stock holdings in Kidde to Kinney on February 2, 1973. Consequently, as of the date of the institution of the instant action, Boise could not and did not even allege that it was a stockholder (let alone the sole, ''majority'' or ''controlling'' stockholder) of Kidde. While Boise alleges that it ''* * * is entitled to the proceeds * * * of all claims arising out of the [Hospital construction job]'', it does not allege that Kidde made any assignment, transfer or anything else to it giving it the right to any such proceeds of any such claims. Indeed, Boise's own counsel in this proceeding (who also was and is Kidde's counsel in the other legal proceedings and the arbitration proceedings), Boise's Senior Vice President and Boise's former Assistant General Counsel have all *sworn* that there was *no*

assignment by Kidde to Boise or anyone (340, 348, 49). Consequently, Kidde, not Boise, has and retained all rights with respect to any claims which it may have arising out of the hospital project.

As the District Court pointed out in its decision below, Boise would like the courts to "pierce the corporate veil" in reverse in order to find that Boise is the sole party in interest (363). As Judge MacMahon also pointed out below, that may not be done under New York law (363, 364, 371).

It is also well settled that, for purposes of diversity jurisdiction, a partnership is a citizen of each state of which a general partner is a citizen. *Great Southern Fire Proof Hotel Co.* v. *Jones,* 177 U.S. 449 (1900); *Lewis* v. *Odell,* 503 F.2d 445 (2d Cir. 1974); C. A. Wright, Law of Federal Courts §27 (2d Ed. 1970). In the instant case Boise itself alleges in its amended complaint that the Architect is a New York partnership (24, 25). That is confirmed by the undisputed affidavits of three general partners of the Architect stating that they were and are citizens of the State of New York (2, 3, 4).

Also, for diversity jurisdiction, a corporation is a citizen of the state of incorporation and the state where it has its principal place of business. 28 U.S.C. §1332(c). It is equally undisputed that Kidde at all times was and is a New York corporation having its principal place of business in the State of New York (53, 257-265, 282). Consequently, the required joinder of Kidde, an indispensable party plaintiff and a New York corporation, will destroy diversity citizenship in this case. Accordingly, the District

Court was correct in granting the Architect's motion below and in dismissing the instant action. Therefore, Boise's appeal should and must be denied in all respects.

POINT II

The Architect will be subjected to a substantial risk of incurring double, multiple or otherwise inconsistent obligations if the present action is permitted to continue.

As pointed out above, the Architect is already a "third-party defendant" to the Hospital in the currently pending consolidated Kidde-Hospital-Architect arbitration proceedings in which Kidde is asserting essentially the same claims against the Hospital which Boise is seeking to assert here directly against the Architect (except for the alleged claim for punitive damages). Consequently, there can be no doubt that if the instant action is permitted to continue the Architect will be exposed to a substantial risk of incurring double, multiple or otherwise inconsistent obligations arising out of the identical claims in different forums, *i.e.*, both here and in the aforesaid arbitration. That, it is respectfully submitted, and as the court below held, in equity and good conscience should not be permitted to occur (367, 368). Rule 19(b), Federal Rules of Civil Procedure.

As the District Court also held, a recovery or non-recovery by Boise in the instant case will also affect Kidde's rights (368). Consequently, for that reason as well the instant action by Boise seeking to prosecute whatever rights Kidde may have should not be permitted to continue.

Since Kidde must be joined as a party plaintiff here if its rights are to be protected such joinder will destroy diversity jurisdiction. At the same time the Architect will be exposed to multiple liability if this action is permitted to continue while the aforesaid consolidated arbitration is proceeding. Consequently, the court below properly granted the Architect's motion to dismiss this action and the instant appeal should be denied.

As the District Court also pointed out, the dismissal of the instant action will not leave Boise without a remedy since it can commence any action which it may elect to bring in the courts of New York State, where there will not be any diversity jurisdiction problem.

Accordingly, the order below should be affirmed and Boise's instant appeal denied.

POINT III

Boise's Contentions

Boise makes numerous contentions on this appeal all of which, it is respectfully submitted, are fully refuted by the record and the applicable law.

First, Boise contends that it "retained" all of Kidde's assets and liabilities, including all of Kidde's claims arising out of the hospital job, that it is "entitled" to all receipts under Kidde's contracts and that Boise "possesses" all claims arising out of Kidde's work. That, we respectfully submit, is fully refuted by the facts, since Kidde was not a party to the Boise-Kinney contract, never ratified, confirmed or "adhered" to it and never assigned to Boise

any rights whatsoever. As also shown above, under New York law Kidde's assets at all times were and remained *its* separate assets, so Boise could not "retain" that which it never owned or had.

Second, Boise contends that Boise dealt with the Hospital and Architect after the February, 1973 stock sale and that *Boise* completed the hospital construction work. The facts show that execpt for one (1) exchange of correspondence between the owner and a Boise executive, *all* of the dealings with the Architect were with Kidde (257-265). Also, *Boise's* own Senior Vice President, Mr. Storey, swore in an affidavit given to the New York courts only last year in connection with this very matter that *Kidde* completed the construction (348).

Third, Boise states repeatedly that a New York court "found" that Boise was the "real party in interest". There was *no* such finding, holding or decision. Nor was any copy of any such alleged decision ever presented to the court below or this Court since no such decision exists.

All statements that Boise was "the real party in interest" were based upon statements and representations made by *Kidde's counsel* (who are also Boise's counsel here and below) that Kidde had been "liquidated" and that Boise was "the real party in interest" (334, 351, 354-355).

Fourth, Boise asserts that Kidde's Board of Directors "acquiesced in" the Boise-Kinney agreement, etc. The Kidde Board of Directors' resolution shows that Kidde appointed a Boise employee as an officer of Kidde to carry out *Kidde's* interests (308).

Fifth, Boise alleges that *it* was "directly wronged" by the Architect "while [Boise was] completing [the hospital] construction." Since, as shown above, Boise's own Senior Vice President has sworn that Kidde, not Boise, completed that construction, Boise's aforesaid contention on this appeal also is without foundation in fact. The same, of course, applies to Boise's numerous other statements based on Boise's alleged completion of the job.

Sixth, the repeated contentions that "Boise, in Kidde's name" did various things is totally unsupported by the record. If that occurred, particularly in the extensive litigation in the state courts, it was never revealed. Indeed, as shown by the record, Boise's officer and counsel both vigorously asserted that it was Kidde, *not* Boise, who had the claims and was the real party in interest (340, 346, 348).

Seventh, Boise's contention that the Architect's "fear of multiple litigation by Boise or Kidde against [the Architect] is entirely without foundation" is completely refuted by the admitted facts and this very action. Boise is, by this very suit, subjecting the Architect to multiple exposure on essentially the very same claims which currently are being prosecuted by Kidde in the consolidated Kidde-Hospital-Architect arbitration in which the Architect is a "third-party defendant". Indeed, Boise even contends on this appeal that *Boise* is the party prosecuting those same claims in that very arbitration (Boise Brief, p. 17).

Last, Boise's various contentions that Kidde should be made a party defendant in this action and that there should be, in effect, a declatory judgment of the respective rights of Boise and Kidde as to Kidde's claims arising out of the hospital project simply is not worthy of discussion.

With respect to the cases cited by Boise in its brief, it is respectfully submitted that those cases are completely inapposite. In the majority of the cases cited the party involved was *not* asserting a claim to corporate property. Other cases involved an individual who was the sole stockholder of a "one-man" corporation who had completely ignored the corporate form for a long period of time, had treated the property as individual property during such time and there were no creditors whose rights would be affected. Consequently, they have no applicability or relationship to the instant case either in fact or in law.

We respectfully submit that the applicable New York law with respect to corporate ownership of corporate assets as it relates to the instant case is that set forth above and in the decision below, which establishes that as a matter of law and based upon the facts in this case, Boise never had or acquired any legal interest in any claims which Kidde may have arising out of the hospital construction project.

Conclusion

The District Court properly granted the Architect's motion to dismiss the instant action. Therefore, it is respectfully submitted, the instant appeal should be denied in all respects.

Respectfully submitted,

HART & HUME
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Service of 2 copies of the
within Brief is hereby
admitted this 3rd day of
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Signed SHK
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